IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1716

NORBERT A. LAING, an individual, on behalf of himself and all other persons, associations, firms and corporations similarly situated,

Petitioner,

vs.

MINNESOTA VIKINGS FOOTBALL CLUB, INC. John Doe, Richard Roe, et al., A.B.C., Inc., et al.,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Petition herein was filed May 16, 1974.

This supplemental Brief is filed by Petitioner, Norbert A. Laing, under paragraph number 5 of Rule 24 of the Rules of the Supreme Court of the United States. The attention of this Court is respectfully called to the new opinion by the Honorable W. T. Sweigert, United States District Judge for the Northern District of California, rendered July 8, 1974 in the football ticket-tying case of *Lawrence Flood v. San Francisco Forty-Niners.* Judge Sweigert denied the Forty-Niners' motion for summary judgment and in so doing apparently endorsed the relevant market argument of Petitioner herein that

it is not essential that the competitive market be limited to the identical tied product. See A-7 herein.

The Vikings' Supplemental Brief herein drew attention to the new opinion by the Fifth Circuit in the Dallas Cowboys' ticket-tying case where that Court purported to follow the Second Circuit in the Buffalo Bills ticket-tying case of *Coniglio v. Highwood Services*, cited in the Petition herein at page 7. However, the Fifth Circuit failed to note the important statement by the Second Circuit that the Buffalo ticket holder's argument was of "extraordinary breadth" so as to include everything "from a trip to the zoo to a night at the opera,". See the Petition herein at page 7.

Further attention is drawn by Petitioner to the Vikings' Supplemental Brief, page A-4, where the Fifth Circuit noted a "spate of cases" and said all had resulted in summary judgment for the defendant football teams. For some reason the decision by Judge Sweigert was not cited although it had been submitted by the ticket holder's counsel.

A copy of Judge Sweigert's opinion denying summary judgment to the Forty-Niners is printed in the Appendix herein.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 72 1704 WTS

LAWRENCE FLOOD,

Plaintiff,

vs.

SAN FRANCISCO FORTY-NINERS,
a limited partnership,

Defendant.

MEMORANDUM OF DECISION

SWEIGERT, District Judge.

This is a class action brought on behalf of season ticket holders for San Francisco Forty-Niner home football games. Plaintiff alleges in substance and effect that the sale of season tickets, packaging pre-season game tickets with regular game tickets, is a "tying arrangement," (the "tied product" being tickets to pre-season games and the "tying product" being tickets to regular season games) in violation of the anti-trust laws, 15 U.S.C. Sec. 1, as interpreted by the courts in the cases hereinafter cited. Plaintiff seeks a decree of this court so declaring and recovery of treble damages as provided by law.

The case is now before the court on defendant's motion for a summary judgment in its favor upon the ground that the record does not present requisite genuine issues of material fact to establish an illegal anti-trust tying arrangement.

The record consists of affidavits, counter affidavits and Court's Exhibits A and B hereinafter further mentioned.

A tying arrangement is one whereby a seller agrees to sell one product, (the tying product) on condition that the buyer also purchase a different (or tied) product. To constitute the kind of tying arrangement held by the courts to be in violation of the anti-trust laws it must appear that there has been a coercive requirement that the sale of one product (the tying product) over which the supplier enjoys a unique control, has been conditioned upon the purchase of a different product (the tied product), in such a way that the purchaser is in effect deprived of the freedom to acquire from some other suppliers a product comparable with the tied product and those suppliers are in effect deprived of access to the market for their competitive product.

It has been said that the vice of such tying arrangements is that they obstruct purchasers' and competitors' free access to the market of the tied product—not because the party imposing the tying requirement has a better product or a lower price, but because of his power or leverage in the market of the tying product. *I.B.M. v. United States*, 298 U.S. 36 (1936); *International Salt v. United States*, 298 U.S. 36 (1936); *International Salt v. United States*, 332 U.S. 392 (1947); *Paramount v. United States*, 334 U.S. 131 (1948); *Times-Picayune v. United States*, 345 U.S. 594 (1953); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *United States v. Loews*, 371 U.S. 39 (1962); *Fortner v. U.S. Steel*, 394 U.S. 495 (1969); *Siegel v. Chicken Delight*, 448 F.2d 43 (9th Cir. 1971).

These cases hold that such tie-ins are unreasonable per se whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free interstate commerce competition in the market for the tied product.

THE FACTS

The facts in the pending case are substantially as follows: The parties agree that a "season ticket," sometimes called an "all inclusive ticket," consists of a package of tickets entitling the holder to reserved seat admission to every Forty-Niner home game, both pre-season and regular, guaranteeing the holder the same seat for each game and, further, an option to renew his purchase of a season ticket for the following season at the same seat or better.

During the last four years, 1970-1973, these season tickets have been customarily sold from February until the August date of the first home pre-season game. During that period the Forty-Niner management would not sell tickets for regular season games unless coupled in a season ticket package with pre-season games; requests for regular season game tickets only (or for tickets for single or specified games) were received only as "orders" subject, of course, to availability of seats remaining after the first pre-season game. After that game, these orders would be filled on a priority basis—the earliest dated order being filled first. Forty-Niner management also customarily set aside 2,000 unreserved seats for general admission ticket sale about ten days prior to each game.

In the year 1970, out of a total seating capacity of 60,000 (Kezar Stadium), 20,000 of these season tickets, entitling the holder to one pre-season and all regular home games, had been sold by the first pre-season game, leaving 38,000 reserved seats available to fill orders for regular season games only—along with the 2,000 general admission seats.

In 1971, out of a total capacity of 46,000 (Candlestick Park partially completed), 38,712 of these season tickets, entitling the holders to two pre-season and all regular home games, had

been sold by the first pre-season game, leaving 5,288 reserved seats available—along with the general admission seats.

In 1972, out of a total capacity of 61,000 (Candlestick Park completed), 53,483 of these season tickets, entitling the holders to three pre-season and all regular home games, had been sold by the first pre-season game, leaving only 5,483 reserved seats available. But, by August 4, 1972, with all the home games yet to be played, all reserved seats had been sold for all games; Forty-Niner management then announced that the 2,000 general admission seats, which had previously been kept for sale just before each game, would be made immediately available for sale on a reserved seat basis—but without the renewal privilege.

In the year 1973[1] an unprecedented demand for renewal of tickets by holders of reserved seat season tickets for the previous year was such that as early as May 11, 1973, all reserved seats for all Forty-Niner 1973 games had been sold out. Forty-Niner management announced that, because of this sell-out, the 2,000 general admission seats would again be made available on a reserved seat basis—but without the renewal privilege.

Plaintiffs' Contentions

Plaintiffs contend that this advance season ticket sale practice, coupling pre-season game tickets with regular game tickets in a single season ticket package, is an unlawful tying arrangement which in effect deprives Forty-Niner ticket purchasers of the opportunity to purchase season tickets for regular season games—except upon the coercive condition of also purchasing tickets for pre-season games which, plaintiffs con-

[1] By its recent order the court permitted plaintiff to file a supplemental complaint putting in issue ticket sale practice for the year 1973 as well as for the years 1970, 1971 and 1972 to which the original complaint was limited.

tend, are mere exhibition games, different from, inferior to and less desirable than regular season games and, therefore, unwanted; further, that such ticket practice anti-competitively affects the market for tickets to other professional football events and tickets to other forms of sport, recreation and entertainment.

Other Cases

The question of the legality of this ticket practice has been presented in six other districts and to two Circuit Courts of Appeal; in each case thus far the ruling has been summarily in favor of the football club defendants—mainly upon the ground that it appeared in those cases that, since ample tickets for regular season games always remained available over and beyond the advance sale of packaged regular game-pre-season game tickets, there was really no coercive requirement for the purchase of pre-season game tickets. See, e.g., *Pfeiffer v. New England Patriots* (D.Mass. No. 71-2501, 7/25/73); *Laing v. Minnesota Vikings*, 372 F.Supp. 59 (D.Minn. (1973), (aff'd 492 F.2d 1381 (8th Cir. 1974); *Driskill v. Dallas Cowboys* (N.D. Texas, No. CA-3-6313-D, 6/1/73); *Coniglio v. National Football League* (Buffalo Bills) (W.D.N.Y. No. 1970-408, 7/30/73), (aff'd 2d Circuit, No. 73-2448, 4/22/74).

One case based its ruling on the ground that as a matter of law, pre-season football games are not "different products" from regular season games within the meaning of the tying doctrine. *Pfeiffer v. New England Patriots*, supra. See also, *Shayne v. Madison Square Garden* (E.D.N.Y. No. 72-22, 1/9/73). Some of these courts have based their rulings on the ground that there was no showing in their cases of an anti-competitive effect on the tied product market. (See, e.g., *Grossman Development Co. v. Detroit Lions, Inc.* (E.D. Mich. No. CA 37652, 11/16/73; *Coniglio v. NFL* (Buffalo Bills),

(2d Cir. No. 73 2448, 4/17/74); *Laing v. Minnesota Vikings*, 492 F.2d 1381 (8th Cir. 1974).

Re "Interstate" Character Of Any Affected Commerce

Although the point has not been raised by either side, we should first consider the basic question whether any involved commerce is interstate in character.

Plaintiffs' allegations concerning the *interstate* character of the commerce allegedly affected by defendants' ticket sales practice (Complaint Par. 7(a)(d)) are to the effect that defendant is a member of the National Football League, composed of defendant and similar football clubs in other major cities of California and other states; that defendants' team plays these other teams in California and other states on a regular weekly basis during the regular league season and sometimes in exhibition games during the pre-season; that these teams necessarily travel in interstate commerce and share in the game ticket sales receipts; that defendant, other teams and the NFL have entered into lucrative contracts for the interstate broadcast of these games by television and radio.

These allegations are in all significant substance admitted by defendant (Answer Par. 7(a)-(d)). Although arguing that its ticket practices do not interfere with any competition, defendant has not questioned in its briefs the *interstate* character of any such commerce as might be held by the court to be affected.

In *Grossman v. Detroit Lions*, supra, the court considering issues identical with the pending case, rejected a Detroit Lions' contention that any affected commerce would not be of interstate character. None of the courts that have thus far considered these NFL or AFL football league ticket practices have ever raised a question concerning the interstate character of any commerce that might be affected.

On the record before us, we are of the opinion that, assuming all other elements of an anti-trust tie-in exist, the defendants' ticket practices would, not only affect "interstate" commerce but would also occur within the stream of such "interstate" commerce within the meaning of such cases as *Radovich v. NFL*, 352 U.S. 445 (1957) and *United States v. Int. Boxing Club*, 348 U.S. 236, 241 (1955).

Effect Of Defendants' Ticket Practice On Identifiable Potential Competition

Since the rationale of the anti-trust tie-in doctrine is that the tie-in practice has anti-competitive effects, the question arises whether such an anti-competitive effect of defendants' ticket practice is shown in the present record.

Defendant contends that, since the very nature of things there could be no other supplier of tickets for Forty-Niner home football games, there can be no conceivable anti-competitive effect. This argument, however, is too narrowly drawn. It is not essential that the competitive market be limited to the *identical* tied product. Indeed, to so hold would virtually abolish the tie-in doctrine. It is enough that there be an obstruction to a market, present or potential, in products or events fairly comparable to the tied product or event in terms of competition.

Plaintiff next broadly contends that the competitive market need not be narrowly drawn to include only professional football games but should include the ticket market for other reasonably comparable sport, recreational or entertainment events which might be anti-competitively affected by defendants' tie-in ticket practice.

It is not necessary, however, to pass upon the question whether and, if so, how far the relevant market of competition should be extended beyond professional football because

the record in the pending case sufficiently shows competition even within that narrow field of professional football, i.e., competition with the nearby Oakland Raiders.

Until recently the only reference in the record to possible professional football competition from the Oakland Raiders appeared in plaintiff's affidavit of Flood, filed April 3, 1973, wherein the affiant, disparaging pre-season games, states that he would prefer on pre-season Sundays to spend $7.50 on going to a racetrack "or even watching the Raiders, who I otherwise would not get to observe except on television."

Recently, the court requested both sides to supplement the evidentiary record with greater detail on this suggestion of possible Oakland Raider competition. Accordingly, defendant filed a supplementary affidavit of Spadia (5/17/74) to the effect that the San Francisco Forty-Niners, who play their games at Candlestick Park and the Oakland Raiders, who play their home games at nearby Oakland Coliseum, are the only professional football teams in northern California, the closest other such team being in Los Angeles, California; that the Oakland Raiders have never, during the years 1970 through 1973, played a game in the San Francisco Bay Area "on a date when" the Forty-Niners were playing a pre-season game in San Francisco or in the Bay Area.

However, the Spadia affidavit sets forth the pre-season home game schedules for the Forty-Niners and the transbay Oakland Raiders, respectively, during the four year period, 1970, 1971, 1972 and 1973. This schedule discloses that, although pre-season games staged by the two teams have not been played on exactly the same "date," there has been a clearly established pattern of pre-season home games being played by the respective teams just one day apart (6 instances), less than one week apart (4 instances) and less than two weeks apart (4 instances).

To amount to competition between the Forty-Niners and the Oakland Raiders for the football fans' $7.50, it is not necessary that their games be played on the very same day; it is sufficient if the games are scheduled close enough together in time and space to reasonably call for a decision by the fan concerning which of several closely scheduled games will receive what may well be the only $7.50 the fan may want to spend for professional football during the limited period.[2]

We are satisfied, therefore, that (unlike the records in *Grossman v. Detroit Lions*, supra; *Laing v. Minnesota Vikings*, supra, and *Coniglio v. NFL-Buffalo Bills)*[3] the record in our pending case sufficiently presents the competitive effect issue. Further, such competition would be substantial since it appears that a Candlestick Park stadium reserved seat capacity of 59,000 at $7.50 per seat for three pre-season games each year could produce a potential sale of Forty-Niner pre-season game tickets amounting to an annual gross of $1.2 million—hardly an insubstantial amount of anti-competitive involvement—especially in the light of comparable, competitive gross pre-season game ticket sales by the Oakland Raiders.

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[2] Speaking of Forty-Niner - Oakland Raider pre-season game competition, it can be noted that another lawsuit (Kerner v. Oakland Raiders, No. C-72-2914 - WTS) involving the identical ticket practice herein alleged, has been brought in this court by a different plaintiff against the Oakland Raiders.

[3] In *Grossman v. Detroit Lions*, supra, it was "admitted that defendant (the Detroit Lions) has no present or identifiable potential competitor in the market of professional football." In *Laing v. Minnesota Vikings*, 492 F.2d 138 (8th Cir. 2/11/73), the court (affirming the trial court's sole ground of decision) (no coercive requirement) added, citing Grossman, supra, the further ground (left undecided by the trial court) that "plaintiff has demonstrated no anti-competitive effect." (p. 1381). In *Coniglio* (2d Cir. No. 73 2448, 4/17/74), the court, citing both Grossman and Laing, said it was "undisputed that there was neither actual nor potential competitors to The Bills (The Buffalo Bills) in the professional football market." (p. 2920, slip opinion).

Re Different Products

Defendant contends that there is no tie-in arrangement here because, as a matter of law, pre-season games, the alleged tied product, are no different than regular season games; that all its football games are, indistinguishably, merely professional football games—regardless whether played in regular or in pre-season. On the other hand, plaintiff contends that pre-season games are obviously different from, inferior to and less desirable than regular season games and, therefore, a "different product" within the meaning of the anti-trust tie-in doctrine.

In this connection one should bear in mind that the primary purpose of NFL is to present football games in which its member teams engage in regular season contests that count for division, league and bowl championships. As a matter of common knowledge the pre-season period has been previously regarded in football, and still is regarded in baseball and other professional sports, as the try-out, conditioning, training or practice period necessary to assemble and test for the ultimate product—the regular season team. Although there is nothing wrong with having pre-season games and selling tickets for them, it is something else to tie in such pre-season game tickets with regular season game tickets. This seems to be much like tying in tickets for rehearsals with repertory theatre tickets or movie tickets—or like tying in tickets for the training camp bouts with prize fight tickets.

In *United States v. Loews*, 371 U.S. 38 (1962) the Supreme Court held that there was an anti-trust tie-in violation when distributors of copyrighted feature motion picture films engaged in block booking films to TV stations, i.e., conditioning the sale of exhibition rights to one or more feature films upon acceptance by the purchaser station of a package of films

containing one or more unwanted or inferior films. The court found no trouble in impliedly holding that the various feature films, although similar in that they were all designed for motion picture entertainment, were each a different product from the other insofar as some were less desirable than others and unwanted by exhibitors. It is much easier to recognize a difference between regular league football games and pre-season practice games.

In *Coniglio*, supra, the 2d Circuit, although ruling for defendant in the no competition issue, rejected defendants' (Buffalo Bills) contention that the difference between pre-season and regular season games was insufficient to present the different product issue.[4]

Without detailing alleged points of difference between pre-season and regular season games, as described in plaintiffs' affidavits, and alleged similarities, as described in defendants' affidavits, we are of the opinion that the evidentiary record herein is sufficient to present the "different products" issue, i.e., whether pre-season games are sufficiently different in their history, their purpose and their nature from regular league competition games to justify an ordinary purchaser's conclusion that the former are different from and less desirable than the latter and for that reason unwanted.[5]

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[4] In *Pfeiffer v. New Engand Patriots*, supra, the court, after expressly recognizing an "obvious distinction" between pre-season games and regular games, strangely proceeded to say that a subdivision of the market on the basis of such an "obvious" distinction would be "untenable."

[5] Conceivably, it could be contended, citing *Loews* and similar cases, that, since there is an arguable difference in sport attractiveness and fan desirability even between regular season games, an advance season ticket practice, requiring a customer to purchase season tickets for all *regular* games (necessarily including some regular games which might be considered by the purchaser to be inferior and unwanted) would involve "different products" and an anti-trust tie-in.

We have in mind that any such extension of the tie-in doctrine might be used to call into question the common practice of opera,

The Coercion Issue

Defendant at first contended that it did not require purchasers of tickets for Forty-Niner regular game tickets to also purchase tickets for its pre-season games. However, in response to request by the court for clarification of the evidentiary record, defendant has admitted that its season tickets have been customarily sold from February until the summer (August) date of the first home pre-season game and that during that period Forty-Niner management would not sell tickets for regular season games unless coupled in a season ticket package with tickets for the pre-season games; that orders made during that period for regular game tickets only (or for single or specified games only) would not be filled but would be set aside as orders to be filled subject to availability of seats after the first pre-season game. Only after that game would such orders be filled. (See, Court's Exhibits A and B—an exchange of letters between counsel and court in response to court's request for clarification of the evidentiary record, i.e., letter from plaintiff's counsel to defendant's counsel, dated May 21, 1973 (Ex. A) and letter from defendant's counsel to plaintiff's counsel, dated May 25, 1973 (Ex. B) both herein for identification).

Plaintiff argues that, under this practice, although some fans may want the whole package, it is also reasonable to expect that others, anxious to avoid an indicated sellout during

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symphony, repertory theatre companies and similar organizations to present a series of selected operas, concerts, plays or events and to withhold general sale of single or specified event tickets pending a season ticket package sale (generally offered to a special list of sponsors). As already noted, however, plaintiff in the pending case does not go so far as to challenge advance season ticket sales for *all regular* games; he limits his challenge to the tie-in of an allegedly different product, i.e., pre-season games, and our ruling in the pending case, being similarly limited, does not imply invalidity of the season ticket practice described in this note.

that advance season ticket sale period, are constrained to buy the package even though it includes pre-season games which they consider different, inferior and, therefore, unwanted.

We are of the opinion that this kind of advance season ticket practice sufficiently presents an issue of coercion especially when (as nearly happened in 1971 and as actually happened in 1972 and 1973) all or virtually all reserved seats were sold out during the season ticket sale period.

In this respect, the pending case is to be distinguished from previous cases which have ruled that there was no coercion when ample regular game tickets always remained available notwithstanding the advance sale of the pre-season-regular game package (e.g., *Pfeiffer*, *Laing*, *Driskill* and *Coniglio*, supra). The implication of these cases, insofar as they stress the availability of remaining regular game tickets, is that, if no such tickets remained, there would be a coercive tie-in within the meaning of the tie-in doctrine.[6]

Conclusion

For the foregoing reasons we conclude that plaintiff, contending that defendant's advance season ticket practice, insofar as it includes a requirement for purchase of pre-season game tickets, is an antitrust tie-in within the meaning of the law, have made a sufficient showing of genuine issues of material fact to preclude summary judgment for defendant. To hold otherwise as a matter of law, would in our opinion, encourage a device by which sellers can utilize their unique control over a desirable event to coerce the public into also purchasing tick-

[6] Indeed, in *Laing*, 8th Circuit, Judge Lay, concurring, refused to affirm the trial court's no coercion ruling—even though regular season tickets remained available; also in *Coniglio* the 2d Circuit rejected the trial court's holding of no coercion—even though there was no showing (as there is here) of a complete sellout during the package season ticket sale.

ets [illegible] different, tied-in products or events which can reasonably be regarded by the public as inferior, undesirable and unwanted.

Defendants' motion for a summary judgment in its favor, is, therefore, denied, but further proceedings will be necessary before a final judgment herein.[7]

Dated: July 8th, 1974.

W. T. SWEIGERT
United States District Judge

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[7] Although neither party has yet moved for a determination whether, and, if so, to what extent, the named plaintiff can maintain this action as a class action, it would seem that, since plaintiff does not challenge defendants' season ticket practice—*except* only insofar as it includes pre-season games in the package—plaintiff's representation would have to be narrowly limited to season ticket holders in that identical class.